

Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, D.C. 20554

*original*

In the Matter of )

Streamlining Broadcast EEO )  
Rules and Policies, Vacating the )  
EEO Forfeiture Policy Statement )  
and Amending Section 1.80 of the )  
Commission's Rules to Include )  
EEO Forfeiture Guidelines )

MM Docket No. 96-16

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**COMMENTS OF EEO SUPPORTERS**

**VOLUME I** DOCKET FILE COPY ORIGINAL

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\* \* \* \* \*

**SUMMARY**

The organizations opposing "EEO Streamlining" constitute the broadest coalition ever to participate in an FCC proceeding.

Our Comments include a comprehensive research study on the relationship between EEO programs and EEO performance. We analyzed the EEO records and currently pending renewal applications of each radio station in Tennessee -- a state uniquely representative of the racial, gender, geographic, and rural/urban diversity of the nation. We have been among those who have had their doubts over the years about the effectiveness of the Commission's EEO enforcement effort, but we were surprised and pleased to find that the Commission's EEO program works quite well. Our principal finding is that stations employing a variety of sources which refer minority job applicants tend to employ relatively more minorities than other similarly situated stations. It follows that those who object to EEO compliance efforts on the theory that they do not work are mistaken.

Quite apart from the hard data, we believe -- with the greatest respect -- that the Commission has profoundly breached its faith with minorities and women by issuing a completely unfounded notice of proposed rulemaking. Adoption of its proposals would be morally wrong, unlawful and unwise. Moreover, the NPRM<sup>1/</sup> is completely at odds with the President's policy on affirmative action. The FCC has the unfortunate distinction of being the only federal agency to propose a cutback in non-quota based, judicially unchallenged EEO enforcement. If the NPRM is any guide, the

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1/ Streamlining Broadcast EEO Rules and Policies (Order and NPRM), 11 FCC Rcd 5154 (1996) ("NPRM").

Commission appears to be in rapid retreat from its historic commitment to diversity.

EEO does not need to be "streamlined" unless it is to create a policy of Zero Tolerance for discrimination. The "burdens" on broadcasters attendant to EEO compliance are negligible or nonexistent. Elimination of EEO enforcement for what would likely be a majority of America's broadcasting stations<sup>2/</sup> would devalue the privilege of a license to operate on the public airwaves, and would impose huge burdens on community groups, colleges and universities, minority and female broadcast professionals, and minority owned broadcasters, among others. See pp. 117-140 infra.

The notion that nonminority broadcasters are excessively "burdened" with EEO recordkeeping is completely without merit. The data broadcasters currently maintain for FCC EEO purposes is the same data every employer maintains anyway in the event of an EEOC charge or Section 1981 suit. Moreover, the concept that it "burdens" nonminority broadcasters to maintain data they should be using to self-assess their EEO progress embeds within it the assumption that promoting diversity is a distasteful chore, rather than a desired objective, an honor and a privilege. See pp. 101-102 infra. We are amazed that people of good will are wringing their hands over the "burdens" on the highly successful,

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<sup>2/</sup> Owing to the rapid ownership consolidation in the broadcasting industry permitted by the Telecommunications Act, the majority of radio stations -- owned in common with many other stations in superduopolies -- are being aggregated into AM-FM EEO reporting units which have much smaller numbers of employees than was the case just one year ago. Consequently, an increase in the minimum number of employees triggering EEO compliance requirements, contemplated by the NPRM, 11 FCC Rcd at 5164 ¶21, would likely exempt the majority of the industry. See pp. 61-64 and 190-195 infra.

almost regulation-free broadcasting industry just to maintain simple fair employment records.

To renew its commitment to diversity, the Commission should take these five essential steps:

1. Make a firm pledge to end discrimination in broadcasting by the year 2009 -- broadcasting's one hundredth anniversary (see pp. 30-34 infra);
2. Adopt a policy of Zero Tolerance for discrimination, through targeted oversight which reduces burdens on EEO compliers while holding EEO violators to the highest standard of critical review (see pp. 214-320 infra);
3. Establish congruence between EEO requirements and the FCC forms used to evaluate EEO compliance (see pp. 321-333 infra);
4. Establish a forfeiture structure which provides an effective deterrent to noncompliance (see pp. 334-343 infra); and
5. Provide rewards for having been, and create incentives for remaining, an EEO Superperformer (see pp. 357-366 infra).

For many years, MMTC, the Office of Communication of the United Church of Christ, the NAACP, LULAC and others have patiently filed proposals to improve the Commission's EEO enforcement efforts, only to have those proposals apparently ignored without even the courtesy of a formal rejection.<sup>3/</sup>

Many of our proposals happen to be deregulatory and thus would be easy to adopt. Others would necessarily require modest

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3/ See National Council of Churches et al., Petition for Reconsideration and Clarification, filed April 11, 1996. The Commission granted the Petition in part, holding that "[t]he proposals in the NPRM sought to further the objectives of our EEO Rule and policies while minimizing undue regulatory burdens on broadcasters. We encourage Petitioners to submit with their comments any alternatives to the proposals that further these goals." Order, FCC 96-198 (released April 25, 1996) ("Order") at 3. It would be a profound disappointment if the Commission has authorized us to undertake the futile act of physically tendering our "alternatives to the proposals" in the NPRM, and later -- for the fourth time -- fails to rule on these proposals.

effort by the government and by broadcasters. This should not be surprising: as Dr. King often reminded us, "freedom is not free."

However, none of our proposals would impose any "undue" regulatory burdens on anyone.<sup>4/</sup> And unlike some of the proposals in the NPRM, none of our proposals would impose any new burdens on minority owned broadcasters, Black colleges, discrimination victims, community groups which supply job candidates, individual job applicants, petitioners to deny, EEO compliers and -- above all -- broadcast listeners and viewers. Indeed, by assisting broadcasters to overcome some of their own worst instincts on issues of race and sex, a strengthened FCC EEO enforcement effort can ameliorate the greatest burdens on the broadcasting industry, one far more costly than "paperwork." Those burdens are the economic cost to all businesses of underutilization of talent, and the competitive disadvantage to business, including broadcasters, caused by the need to subsidize a two-class society.

We have invested the time and effort required to submit a comprehensive set of proposals because of the importance, breadth, and subtleties of the issue before us. EEO, like health care, airline safety, immigration, water, air and food quality -- and telephone and cable rates -- demands the care and thoroughness of advocates and regulators.

Discrimination is an intricately interwoven thread within the fabric of our society. It has been with us for 400 years. Eliminating it will take work, commitment and courage. Colin Powell stated it best: "It Can Be Done."

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<sup>4/</sup> See Order at 3.



Upon his retirement, Commissioner Andrew C. Barrett stated:

I am departing...at a time when the Commission is reconsidering its EEO rules and provisions affecting minority telecommunications ownership. I would hope my colleagues will remember my concerns as the Commission renders decisions on these issues. 5/

The Commission would do its departed colleague and the public a great honor by ruling on our proposals to improve EEO enforcement.<sup>6/</sup> One way to do this is through a negotiated rulemaking, a concept put forward in the Comments of American Women in Radio and Television (AWRT). We endorse AWRT's proposal wholeheartedly.

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5/ Commissioner Andrew Barrett Departs Commission, FCC Press Release, March 29, 1996.

6/ Congress intended that "the benefits of agency expertise and creation of a record will not be realized if the agency never takes action." TRAC v. FCC, 750 F.2d 70, 79 (D.C. Cir. 1984). See NCCB v. FCC, 597 F.2d 1095 (D.C. Cir. 1977) (requiring Commission to rule on alternative proposals which are plainly within the scope of a notice of proposed rulemaking). Recently, the Commission ruled that adjudications are not the proper place to consider EEO policy proposals. In UTV of San Antonio, Inc., FCC 96-290 (released July 22, 1996) at 2 ¶3, the Commission rejected the NAACP's request to allow non-Census labor force data because it tended to disfavor smaller stations, holding that "the license renewal process is generally not the proper forum for us to change policies or to adopt new policies in this area.") See also Spectacor Broadcasting L.P., 9 FCC Rcd 1729, 1730 n. 5 (1993); Employment Policies and Practices of Certain Broadcast Licensees and Broadcast Headquarters, 67 FCC2d 1244, 1246 (1978) (holding that proposals to extend EEO review to headquarters offices and to conduct midterm review were rulemaking proposals and should not have been propounded in an adjudicative proceeding). If adjudications are not the proper place to consider our proposals, this rulemaking proceeding must be the proper place.

**INTRODUCTION**

We respectfully provide these Comments in response to the Commission's NPRM, 11 FCC Rcd at 5154.\*/

The commenting parties represent the broadest and deepest aggregation of Americans ever to participate in an FCC proceeding. They include most of the leading civil rights and media advocacy organizations, religious organizations representing the majority of this nation's churches and churchgoers, and each of the associations of minority owned broadcasters. Their unified voice on this bedrock issue of communications policy bespeaks the enormous depth and breadth of public consensus behind equal opportunity in broadcast employment.

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\*/ The views expressed in these Comments are the institutional views of the organizational commenters, and do not necessarily reflect the individual views of each of any organization's officers, directors or members.

We deeply appreciate the Commission's graciousness in extending the filing deadline to permit us to complete our research and assemble these Comments.

I. **The Commission's EEO Program Needs Clear Goals, And An Unwavering Commitment To Achieve Those Goals By A Date Certain**

- A. **Until discrimination ends, the EEO initiative should be inviolate. The Commission must correct the mistake it made by expressing only wavering commitment to EEO.**

The Commission's goal in this proceeding should be the elimination of discrimination and its present effects, root and branch, from the broadcasting industry.

Until all vestiges of a two-class system of employment have been eliminated from broadcasting, strong and comprehensive EEO enforcement is an absolute necessity -- without qualification, equivocation, opting out, waiving out or exempting out.

Providing equal employment opportunity, and taking affirmative steps to remedy the consequences of decades of unequal opportunity, should be considered an honor for all broadcasters -- urban and rural, large and small, television and radio. Equal Opportunity should be sacrosanct in the law of broadcasting.

How long will it be before EEO can be "deregulated?" Not long. We invite the Commission to work with us to design a plan to end broadcast industry discrimination and its present effects by the year 2009 -- the 100th anniversary of the broadcasting industry. See pp. 30-34 infra.

1. **Just as we stand at the halfway point on the road to equal opportunity, the Commission is tiring of the task at hand**

Since FCC EEO oversight began in 1969, we have come roughly halfway toward full equal opportunity. See Table 2, p. 38 infra. We can finish the job in thirteen more years, but it will take willpower and leadership because the nature of discrimination has changed. Although bad actors and ill will still abound, open and

notorious discrimination has been replaced with a malignant and evasive variety. The historical record shows that the Commission can no longer cherry-pick enforcement cases based on licensees' admissions of discrimination or inept and clumsy attempts to conceal it.

The first phase of FCC EEO enforcement, 1970 through 1980, involved easy cases in which licensees openly flouted the EEO Rule, not yet believing that the Commission would really enforce it. For example, one large radio licensee openly maintained that it would recruit minorities only for "suitable" jobs.<sup>7/</sup> The Wiley and Ferris administrations made it clear that this type of broadcaster was not a suitable public trustee.

During the second phase of FCC EEO enforcement, 1981 through 1987, discriminating licensees who wanted to cover their tracks made obvious and clumsy mistakes, such as lying about the number of

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<sup>7/</sup> Bob Jones University, 25 FCC2d 723 (1970) ("Bob Jones") (licensee's school did not admit Blacks and did not hire Blacks as faculty members, and it contended that Blacks were uninterested in its station's classical and religious programming; the Commission required it to adopt an EEO program a year before it required all licensees to do so). See also Federal Broadcasting System, Inc. (HDO), 59 FCC2d 356 (1976) ("Federal (HDO)") (licensee used "Application - Male" form for announcers and "Application - Female" form for secretaries); New Mexico Broadcasting Co., Inc. (HDO), 54 FCC2d 126 (1975) ("New Mexico (HDO)") (licensee allegedly told job applicant he hired no "niggers" or "Mexicans"); Rust Communications Group, Inc. (HDO), 53 FCC2d 355 (1975) ("Rust (HDO)") (licensee's EEO program said it would hire minorities for "suitable" positions when "feasible"); Leflore Broadcasting Co., Inc. (HDO), 46 FCC2d 980 (1974) ("Leflore (HDO)") (licensee locked out Black announcers when it changed format, rather than giving them a chance to try out for the new format); and Walton Broadcasting, Inc., 54 FCC2d 665 (Rev. Bd. 1975) ("Walton (HDO)") (EEO issue added by Review Board to hearing in progress when licensee admitted it had no EEO program). No hearing was designated in King's Garden, Inc. (MO&O), 34 FCC2d 937 (1972) ("King's Garden (MO&O)") since the licensee admitted it discriminated and raised only the defense that religion is a bona fide occupational qualification.

minorities or women they hired,<sup>8/</sup> telling three conflicting stories about the reasons minorities were fired,<sup>9/</sup> or asking an exceptionally alert job counsellor "don't you have any white girls to send me? This one would make charcoal look white."<sup>10/</sup> These cases weren't difficult to prosecute, but more sophisticated discriminators easily evaded scrutiny from the sleepy Fowler Commission. Indeed, the Commission's fixation on misrepresentation as the only indicator of discriminatory intent has sent the unfortunate message that as long as a licensee tells the truth -- or stands mute -- it can retain and sell its most valuable asset.

The third phase of FCC EEO enforcement began in 1987 and continues today. In nearly every EEO case in this period, discrimination was suspected, but could not be proved. These cases involved the same abysmal hiring records as earlier cases. However, discriminators often "get away with it" because the regulatory tools used by the Commission are no match for the discriminators' concealment tactics, making discrimination ever more difficult to uncover and prosecute.<sup>11/</sup> EEO issues were tried

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<sup>9/</sup> Beaumont NAACP v. FCC, 854 F.2d 501 (D.C. Cir. 1988) ("Beaumont").

<sup>10/</sup> Catoctin Broadcasting of New York, Inc. (HDO), FCC 85-155 (released May 7, 1985); I.D., FCC 86D-52 (Miller, ALJ, 1986), aff'd, 2 FCC Rcd 2126 (Rev. Bd. 1987), review denied, 4 FCC Rcd 2553, 2554-55 ¶¶15-16 (1989) ("Catoctin"), recon. denied, 4 FCC Rcd 6312 (1989), aff'd per curiam by Memorandum, No. 89-1552 (released December 18, 1990).

<sup>11/</sup> The Patrick, Lee, Sikes, Quello and Hundt commissions' enforcement strategy has relied on the weakest possible investigatory tool -- the paper investigation. See pp. 290-302 infra. The Commission has also relied on the weakest possible remedial tool -- forfeitures. See pp. 334-343 infra.

<sup>8/</sup> Albany Radio, Inc., 97 FCC2d 519 (1984) ("Albany"); Metroplex Communications of Florida, Inc., 96 FCC2d 1090 (1984) ("Metroplex").

against four renewal applicants during this period, but none of them resulted in denial of an application.<sup>12/</sup>

Not only does this history disclose discriminators' growing sophistication in avoiding regulatory scrutiny, it also reflects the Commission's own unsteadiness in enforcing the Rule over the long term.<sup>13/</sup> Although the chance that a nondiscriminator will have its license renewal erroneously denied for discrimination is zero, there is virtually a 100% chance that a discriminator will have its license renewal erroneously granted.<sup>14/</sup> The issuance of a hearing designation order is by far the single most important prophylactic step the Commission can do to awaken broadcasters to

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12/ The Lutheran Church/Missouri Synod (HDO), 9 FCC Rcd 914 (1994) ("Lutheran (HDO)"); Dixie Broadcasting Co. (HDO), 7 FCC Rcd 5638 (1992) ("Dixie (HDO)"); WXBM-FM, Inc. (HDO), 6 FCC Rcd 4782 (1991) ("WXBM (HDO)"); Bennett Gilbert Gaines (MO&O), FCC 94M-531 (released September 19, 1994) (adding EEO issue to hearing in process), Supplemental I.D., 10 FCC Rcd 6589 (1995) ("Gaines").

13/ The Commission's overall enforcement record has certainly caused minority and female broadcast professionals to doubt the Commission's commitment to protecting their civil rights. A complete iteration of abominable FCC EEO rulings would be too lengthy to set out here. Some of the worst rulings are manifested in Beaumont (reversing the Commission's refusal to hold a hearing on well documented allegations that ten Blacks were fired and replaced by Whites in connection with a format change); Banks Broadcasting Company, MM Docket No. 85-65, FCC 85-122 (released April 4, 1985) ("Banks") (refusing to hold a hearing on allegations that a licensee paid 22 African American employees far less than their White counterparts doing the same work); and WAVY Television, Inc., 53 RR2d 655, 658 (1983) ("WAVY") (refusing to hold a hearing or even sanction a Norfolk television station which held its Christmas party at a segregated country club and told the African American employees that it was very sorry, they couldn't attend).

14/ The hearing rights provided by Section 309(e) of the Act provide a robust assurance that no nondiscriminator will ever be unjustly found guilty of discrimination. However, no one can seriously argue that the Commission's EEO enforcement efforts catch most discriminators. Over the past 25 years of EEO enforcement, the Commission has caught almost none of them. It has been two years since the Commission designated any renewal application for hearing on an EEO issue.

their EEO responsibilities.<sup>15/</sup> However, there have only been twelve license renewal hearings designated on EEO issues in the past twenty-five years, plus one case, King's Garden (MO&O), in which no hearing was designated because discrimination was admitted.<sup>16/</sup> Furthermore, no license renewal has ever been denied based on EEO violations.<sup>17/</sup>

Despite having a seasoned and very capable EEO Branch staff, the Commission has instituted no major innovations in EEO enforcement since 1971. Instead, progress has come largely as a result of court decisions striking down abysmal and indefensible Commission decisions.<sup>18/</sup> The diligence of EEO enforcement has often depended upon the shifting political winds, as illustrated by the period between 1981 and 1987, when EEO enforcement virtually

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<sup>15/</sup> Chairman Hundt was on to something when he wondered aloud why "the Commission has for at least 15 years not taken away a single one of the approximately 1500 TV licenses or 10,000 radio licenses in this country for failure to serve the public interest." Statement of Chairman Reed E. Hundt at the Conference for the Second Century of the University of Pittsburgh School of Law: A New Paradigm for Broadcast Regulation, September 21, 1995, at 5.

<sup>16/</sup> Six hearing designation orders containing EEO issues were issued in the 1970's, two in the 1980's, and three in the 1990's. See ns. 7, 8, 10 and 12 supra. No hearing designation order has issued since February, 1994.

<sup>17/</sup> The closest the Commission has ever come to denying an application for EEO violations was in Catoctin, 4 FCC Rcd at 2558 ¶44, and in Walton Broadcasting Co. (Decision), 78 FCC2d 857, 877 ¶56 (1980) ("Walton (Decision)"). In these cases, the Commission denied renewal on other grounds, then held, almost as an afterthought, that were it not for those other grounds, the licensee's discrimination would also compel denial of renewal.

<sup>18/</sup> See, e.g., Beaumont (the Commission must hold a hearing when a licensee offers conflicting explanations for the departures of most of its minority employees) and NBMC v. FCC, 775 F.2d 342 (D.C. Cir. 1985) ("NBMC") (Commission must investigate further when a licensee ignored the EEO rule over two consecutive license terms; Commission cannot consider post-term improvements when the license term record reflected systematic noncompliance).

ground to a standstill.<sup>19/</sup> Since 1987, the Commission's emphasis has been on the imposition of forfeitures, all of which have been exceedingly small.<sup>20/</sup> The Commission's hesitant and unsteady enforcement program, combined with the white flag it has waved with this NPRM, makes it unsurprising that some broadcasters feel that EEO is not a high priority of the Commission and is thus a vulnerable target for "deregulation."<sup>21/</sup> The blood of civil rights is in the water and the sharks are tense and circling.

When the EEO Rule was first adopted, the Commission had a goal, and that goal could not have been more clearly articulated:

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<sup>19/</sup> That is why this Commission must be firm in setting out long lasting criteria for EEO enforcement to provide guidance to future commissioners. Between 1981 and 1987, the Commission performed exactly one investigation (involving female employment at a small South Dakota radio station) pursuant to the requirement of Bilingual Bicultural Coalition on the Mass Media, Inc. v. FCC, 595 F.2d 621 (D.C. Cir. 1978) ("Bilingual II"); herein, such investigations are referred to by their commonly accepted name of Bilingual investigations.

<sup>20/</sup> Forfeitures for rule violations have been running at approximately one-tenth the amounts of forfeitures for violations of the children's TV and indecency rules. See pp. 337-339 infra. A slap on the wrist forfeiture, "far from having a cathartic effect on management of the station...would be cynically viewed as just another cost of doing business." See United Broadcasting of Florida, 55 FCC2d 832, 841 (1975) ("United"), recon denied, 60 FCC2d 816 (1976).

<sup>21/</sup> In contrast to the 1968 EEO proceeding, where only the NAB filed an opposition, the industry has turned out in a huge, cynical, and profoundly disturbing force. The sheer volume and expense of the anti-EEO filings in this proceeding prove that the EEO opponents are not really interested in "paperwork burdens" at all. According to the Commission's 1995 EEO Trend Report (February 7, 1996) ("EEO Trend Report - 1995") at 756, there are approximately 153,000 jobs in the broadcasting industry. Forty-four percent of those job turn over in a given year, according to our study of Tennessee radio stations' EEO programs (Exhibit 1 infra; see discussion of variable JJ). The cost of first class postage to mailing notices for 44% of 153,000 jobs to four referral sources is \$86,170. That amount is a pittance compared to the industry's costs of seeking the further evisceration of EEO enforcement. It is a nauseating display.



"achieving equal employment opportunity at the earliest possible time."<sup>22/</sup> Nondiscrimination in Broadcasting, 18 FCC2d 240, 245 (1969) (emphasis supplied) ("Nondiscrimination - 1969").

In order to achieve that goal, the Commission did not acquiesce to nonminority broadcasters' self-interested complaint that full freedom for minorities and women to participate in the broadcast workplace would "burden" them. Instead, when it proposed the Rule, the Commission proclaimed with simple eloquence that "[t]he thrust of our message is that the Nation requires a maximum effort in this vital undertaking and [we] call upon all broadcasters to make as great a contribution as they can." Nondiscrimination in Broadcasting, 13 FCC2d 766, 775 (1968) ("Nondiscrimination - 1968").

Contrast the exuberant willingness of the 1968 Commission to swim upstream with the 1996 Commission's languid treading of water. Squandering a long overdue opportunity to honor the D.C. Circuit's command that it establish "more exacting standards" for EEO compliance,<sup>23/</sup> the 1996 Commission has issued a crabbed call for only those proposals which would somehow "minimize any undue paperwork burdens for all broadcasters while maintaining effective

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<sup>22/</sup> Without EEO enforcement experience, it was premature then for the Commission to guess what would be this "earliest possible time." As shown infra, twenty years of experience with the Rule has provided the Commission with sufficient information to now permit it to establish numerically that "earliest possible time."

<sup>23/</sup> "If the 'curious neutrality-in-favor-of-the-licensee' which this court has previously noted, Office of Communication of the United Church of Christ v. FCC [425 F.2d 543, 547 (D.C. Cir. 1969) ("UCC II")], is to end, there must be a more meaningful accounting for conduct during the contested license period and more exacting standards established for the future." Black Broadcasting Coalition of Richmond v. FCC, 556 F.2d 59, 65 (D.C. Cir. 1977) ("BBC").